

National Park Service Guide to the Federal Advisory Committee Act

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The purpose of this Guide is to acquaint National Park Service managers and other employees with the Federal Advisory Committee Act (FACA), how FACA applies to NPS management activities, and standard procedures for establishing and renewing advisory committees. This guide does not address the day-to-day administration of committees after they have been established.

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Appendix A -- Charter Requirements

A. WHAT IS FACA'S PURPOSE?

Congress passed FACA in 1972 to create an orderly procedure by which Federal agencies may seek advice and assistance from citizens. Congress was concerned that there were too many advisory committees, and some of

those advisory committees were either not contributing anything of substantive value or were duplicating another committee's efforts. Now, any time a Federal agency intends to establish or utilize an advisory group having at least one member who is not a Federal employee, the agency must comply with FACA and administrative guidelines developed by the General Services Administration (GSA).

B. ARE ANY COMMITTEES NOT SUBJECT TO FACA?

In general, any panel, conference, or similar group established or utilized by a federal agency for the purpose of obtaining consensus advice or recommendations on issues or policies will likely fall within the purview of FACA. Remember that management decisions can be challenged and possibly negated as a result of FACA procedural violations.

For this reason, you should be cautious when assembling a group for discussion or consultation. But also be aware that (a) many of the meetings the federal government typically holds are with groups that are not "established or utilized" within FACA's meaning and that (b) there are ways to avoid implicating FACA.

GSA regulations [41 CFR Part 102-3] recognize some kinds of advisory meetings are not covered by FACA. These include meetings with:

1. One individual.
2. Any group where advice is sought from the attendees on an individual basis and not from the group as a whole (this includes public meetings). In meetings of this sort, remind the group that you are seeking individual views and are not looking for the group to agree on a particular course of action.
3. Any group that meets with federal officials for the purpose of exchanging facts or information.
4. Any committee or group created by non-federal entities (such as a contractor or private organization), provided that these committees or groups are not actually managed or controlled by the executive branch.
5. Any local civic group whose primary function is that of rendering a public service with respect to a federal program.
6. Any committee composed wholly of full-time or permanent part-time officers or employees of the federal government.
7. Any committee composed wholly of full-time or permanent part-time officers or employees of the federal government and elected officers of State, local and tribal governments (or designated employees with authority to act on their behalf), acting in their official capacities. The purpose of the committee must be solely to exchange views, information, or advice relating to the management or implementation of federal programs established pursuant to statute that explicitly or inherently share intergovernmental responsibilities or administration.
8. Any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

If you occasionally meet with individuals or groups under conditions akin to one or more of these exemptions, you should be mindful not to change the character of the meeting such that it would become subject to FACA.

If you are careful, there are two additional ways (beyond those specifically recognized by GSA) to obtain public participation in review of agency matters without establishing a FACA committee.

First, a policy discussion group or "roundtable" can be formed to solicit individual (as opposed to group) opinions on draft proposals, option papers, or specific issues.

Second, focus groups may be used to solicit individual (as opposed to group) opinions when there is a need for quick, anecdotal information about how different approaches to solving a problem would work in practice.

Neither of these non-FACA options is appropriate, however, if the goal is to obtain consensus advice. Indeed, when meeting with a number of individuals under these circumstances, you should emphasize that you are seeking only the attendees' individual views, and the attendees should be discouraged from attempting to reach a consensus, or otherwise making recommendations as a group.

C. DOES FACA APPLY TO AD HOC COMMITTEES OR COMMITTEES THAT WILL EXIST FOR ONLY A BRIEF PERIOD OF TIME?

It depends on how the committee was formed and its relationship with the NPS. FACA applies to any committee that an agency forms for the purpose of providing consensus advice, regardless of its duration. However, if (for example) an ad hoc group of citizens initiates a meeting with a park superintendent to present its consensus views on park issues, that meeting would not be subject to FACA. But such meetings could become subject to FACA if the superintendent funded the meeting, controlled the agenda of the meeting, or used the group recurrently as a preferred source of advice or recommendations.

D. ARE THERE ALTERNATIVES TO ESTABLISHING A FACA COMMITTEE?

In structuring interactions with groups so as to avoid the need to charter a committee under FACA, you should consider all the factors a court would consider in determining whether the agency has "established" or "utilized" an advisory committee. These factors include:

1. The purpose of the meeting(s) (i.e., as noted above, the meeting should not suggest a purpose of seeking consensus on a given federal program or policy).
2. The frequency of meetings (i.e., too many successive meetings-particularly, with the same participants or an ever-narrowing pool of them-could suggest the non-public, behind-the-scenes policy- or decision-making that FACA was designed to avoid).
3. Who attends (e.g., certain kinds of participants-listed above-strongly indicate that a meeting was FACA-exempt).
4. Whether the participants change or remain constant over the course of multiple meetings (i.e., a constant or standing group would be more likely to implicate FACA than a changing group).
5. Whether group input from participants, as opposed to expression of individual views, is an objective or result even if "consensus" is not obtained (i.e., the more it appears that there is group input as opposed to individual input, the greater the risk the meeting could be perceived as one set up to achieve-or actually achieving-consensus of the kind that FACA addresses).

GSA regulations governing FACA activities suggest using these additional factors to determine whether or not a group is "utilized" within the meaning of FACA:

1. Does the federal agency manage or control the group's membership or otherwise determine its composition? (I.e., the fewer the indicators of federal control over the group, the less likely that FACA could be seen to apply)
2. Does the federal agency manage or control the group's agenda? (same)
3. Does the federal agency fund the group's activities?

Answering "yes" to any or all of these three questions does not automatically mean the group is "utilized" within

the meaning of FACA. But if the relationship between the federal agency and the group essentially is indistinguishable from an advisory committee established in other instances by the BLM and/or FS, then it may well be subject to FACA.

E. WHAT IS THE GENERAL SERVICES ADMINISTRATION'S ROLE?

The GSA is responsible for monitoring all FACA committees. As part of this responsibility, GSA:

1. Conducts annual reviews of FACA committee accomplishments;
2. Responds to inquiries from agencies on establishing new FACA committees or renewing existing groups; and
3. Prepares an annual report summarizing committee activities.

The NPS and other Federal agencies that administer FACA committees must provide timely information to GSA so that GSA can perform these functions efficiently. When the NPS is unresponsive to GSA's request for information concerning an advisory committee, it may create the impression that the committee either is not complying with FACA or not fulfilling a vital role and, perhaps, is unnecessary.

GSA maintains an Internet World Wide Web site which contains helpful information about FACA. The site's address is: <http://www.gsa.gov/portal/category/21243>.

F. HOW DO WE ESTABLISH ADVISORY COMMITTEES?

The NPS administers more than 30 advisory committees subject to FACA. Many of these FACA committees are specific to individual park units, but there are others that have been established to advise on Service-wide programs or projects. NPS FACA committees are generally established in one of two ways:

1. Legislatively, when Congress specifically establishes the committee or directs the Secretary of the Interior to establish it for some purpose related to the NPS.
2. Administratively, when the NPS determines an advisory committee is essential to the performance of a duty or responsibility imposed upon NPS by law. The NPS has been given general authority under section 3(c) of Public Law 91-383 to administratively establish advisory committees. The NPS also has authority under the Negotiated Rulemaking Act, as amended, to establish negotiated rulemaking advisory committees.

(NOTE: The Committee for the Preservation of the White House was established by Presidential order.)

G. WHAT PROCEDURES DO WE FOLLOW FOR LEGISLATIVE COMMITTEES?

Most of our advisory committees are established legislatively. In recent years, Congress has created advisory committees for many of our new park and program initiatives. When we become aware that a member of Congress is preparing such legislation, the Office of Legislative and Congressional Affairs or the affected NPS park or program area should work with the NPS Office of Policy to try to ensure the legislation does not create unintended administrative difficulties. The NPS's position on such legislation must always be consistent with the Administration's official position, which is determined by the Office of Management and Budget.

When legislation establishing an advisory committee is enacted, the responsible field or program area staff should contact the Washington Office of Policy because the next steps to be taken may vary slightly, depending on the wording of the law. For example, the law may give the Secretary of the Interior wide discretion in making appointments to the committee, or the law may explicitly prescribe the sources from which the Secretary is to make appointments. Generally, the following documents must be prepared and submitted to the WASO Office of Policy:

1. A proposed charter, which will include the information listed in Appendix A.
- 2 (a). A list of prospective committee members, together with biographical information about the persons recommended for appointment
or
- 2 (b). A list of government and private organizations from which nominations should be solicited, together with a proposed letter to those organizations, asking them to send in nominations.
3. A proposed letter of appointment. (Examples are available from the Office of Policy.)

H. WHAT PROCEDURES DO WE FOLLOW FOR ADMINISTRATIVE COMMITTEES?

You should be aware that Congress, the President, and the Office of Management and Budget (OMB) have indicated they want to avoid the unnecessary proliferation of advisory committees. Toward that end, a "cap" has been placed on the number of discretionary advisory committees each agency may establish. While it is very important that we encourage public involvement in our activities, alternatives--such as scoping sessions and public meetings--should be explored before establishing a FACA committee. (See Director's Order #75A: Civic Engagement and Public Involvement for more details.) In those instances where the NPS can accomplish its objectives only by utilizing a group of individuals to obtain consensus advice, the NPS must follow administrative procedures that emanate from FACA and are spelled out in detail in GSA regulations.

Anyone who believes there is a compelling need for an advisory committee should discuss the matter with committee management staff at the regional or Washington level, and then seek concurrence from the appropriate regional director or the associate director having programmatic responsibility. When agreement is reached at that level, conceptual approval should be sought from the Director, through the WASO Office of Policy. The Office of Policy will then confer with the Department's Committee Management Officer (CMO).

Once a committee is approved conceptually by the Director and the Department's CMO, the following documents must be prepared and submitted to the Office of Policy.

1. A proposed charter, which will include the information listed in Appendix A.
2. A Statement of Justification for establishing the committee.
- 3 (a). A list of prospective committee members, with biographical information about the persons recommended for appointment.
or
- 3 (b). A list of government and private organizations from which nominations should be solicited, together with a proposed letter to those organizations asking them to send in nominations.
4. A proposed letter of appointment
5. A Notice of Establishment for the Federal Register.

I. WHAT IS A NEGOTIATED RULEMAKING ADVISORY COMMITTEE?

Negotiated rulemaking (or "reg neg"-- short for regulatory negotiation) committees are the one form of administratively established committee that both the President and Congress actually encourage. The idea behind reg neg committees is that the traditional government agency process for developing agency regulations is too adversarial, and may lead to expensive and time-consuming litigation. In the reg neg process, those parties who will be significantly affected by a regulation are invited by the agency to participate in a committee to develop the

regulation. For example, Cape Cod National Seashore used this process in 1995 to develop off-road vehicle regulations. Although a reg neg committee is established administratively, there are special procedures that apply under 5 U.S.C. 561-570. Those who consider establishing a reg neg committee should first contact the Office of Policy or their servicing Solicitor's office.

J. HOW MUCH TIME DOES IT TAKE TO ESTABLISH A COMMITTEE?

Most of the time-consuming aspects of advisory committee management are prescribed by law, regulation, or Departmental policy, and are beyond the NPS's control. The NPS Office of Policy must ensure that the documents needed to set up a committee--whether legislatively or administratively established--are circulated for signature at the appropriate levels within the NPS and the Department. Since most of the documents must go through several offices at the Assistant Secretarial and Secretarial level, the process normally takes several months. If letters are sent to nominating sources, it normally takes an additional two months before responses are received and the NPS is ready to send appointment letters to the Secretary for signature. The last administrative step is to file the charter with GSA, the Library of Congress, and the NPS's authorizing committees in the Senate and the House of Representatives. A committee is officially in business the date the charter is filed.

K. WHAT IS A GROUP FEDERAL OFFICIAL?

FACA requires the sponsoring agency to appoint a Group Federal Official to oversee the administration of FACA's requirements. The Group Federal Official for the NPS is located in the Washington Office of Policy.

L. WHAT IS A DESIGNATED FEDERAL OFFICER?

A Designated Federal Officer must be assigned to each advisory committee to:

1. Approve or call meetings;
2. Approve agendas;
3. Attend meetings;
4. Chair meetings (when requested by the Director);
5. Adjourn meetings when such adjournment is in the public interest;
6. Maintain required records on costs and membership;
7. Ensure efficient operations;
8. Maintain records for availability to the public; and
9. Provide copies of committee reports to the Group Federal Official.

M. WHY IS A COMMITTEE CHARTER NECESSARY?

No advisory committee may meet or take any action until a charter has been filed with GSA, the NPS's House and Senate authorizing committees, and the Library of Congress. Also, FACA section 14(b) requires that each advisory committee file a new charter every two years following the date of establishment. (Public Law 102-523 exempts from this re-chartering requirement NPS advisory committees that are established legislatively and serve NPS park units.) A committee may not meet or take any action if its charter has expired. If a committee's charter has expired, the committee must be reestablished (as opposed to simply renewing a current charter) in order to continue operating. The NPS Office of Policy coordinates closely with the originating NPS office in developing a charter that contains the elements listed in Appendix A and other necessary information derived from specific authorizing legislation.

N. HOW ARE COMMITTEE MEMBERS APPOINTED?

FACA requires that membership "...be fairly balanced in terms of points of view represented and the functions to be performed by the advisory committee." We are expected to assure that major--and sometimes strongly opposing--viewpoints are represented to provide a foundation for developing advice and recommendations that are fair and comprehensive. However, this does not mean we must appoint committee members who oppose the basic program or activity for which the advice is sought.

Generally, candidates for appointments to NPS advisory committees may be nominated by agency officials, Members of Congress, other elected officials, the general public, professional societies, or current and former committee members. However, if the committee's authorizing legislation specifies who is to make nominations, then we will write to those nominating sources to obtain nominations. (You should confer with the Office of Policy regarding who should sign the letters.) The authorizing legislation will often stipulate the qualities or characteristics that candidates should possess. NPS park or program area representatives will be asked to make recommendations from among the nominees, but final selections will be made by the Secretary of the Interior following a screening process conducted by the DOI's White House Liaison. (See appointments flow chart at www.nps.gov/policy/advisory/Apptsflow.pdf.)

Most often, a committee's enabling legislation specifies the length of time that members will serve on advisory committees. If the legislation does not set time limits, the NPS will set limits (3 or 4 years is usually appropriate). Unless the legislation specifies otherwise, members can usually be re-appointed for consecutive terms. However, while continuity in service may be desirable in some respects, so is a fresh perspective and a diversity of viewpoints.

Prior to accepting an appointment, the prospective member should be informed of his or her duties and obligations, allowable expenses, and compensation limitations. Poor attendance or lack of participation is grounds for removal. Actual criteria for removal should be spelled out in the charter.

O. HOW MUCH OPPORTUNITY DOES AN NPS MANAGER HAVE TO INFLUENCE OR CHANGE THE COMPOSITION OF THE COMMITTEE MEMBERSHIP?

In the case of a committee established administratively, the manager can work with the Committee Management Officer to craft a membership plan that will reflect a balanced cross-section of those directly affected, interested, and qualified. The manager will also be asked to make specific recommendations for appointments to the committee. In the case of a committee established legislatively, the authorizing legislation usually prescribes the number of members and the sources from which nominations will be sought. In such cases there is much less opportunity to influence the composition of the committee. But managers will still have the opportunity to make recommendations from among those who have been nominated.

P. MAY COMMITTEE MEMBERS BE PAID?

FACA authorizes--but does not require--agencies to pay a member of an advisory committee at a rate not to exceed the amount specified for GS-18. As a practical matter, members of NPS advisory committees do not receive compensation (other than travel expenses). NPS managers may not pay committee members without the Director's prior approval.

Q. MAY SUBCOMMITTEES BE CREATED?

Committees may form themselves into subcommittees and ad hoc committees, drawn in whole or in part from the full committee. However, the role of such committees must be limited solely to gathering information or conducting research for the full committee, to analyzing relevant issues and facts, or to drafting proposed position

papers for deliberation by the full committee. Advice given formally to a federal agency or federal official must come from the full committee following an open public meeting, rather than from a subcommittee, which may perform its deliberations in private. Membership on the subcommittees should be approved by the Designated Federal Officer.

R. HOW DO WE DEAL WITH CONFLICTS OF INTEREST?

Responsible park or program staff must provide prospective advisory committee members with information regarding any applicable standards of conduct, including those that may be imposed by Federal conflict of interest statutes. Often, committee members are appointed to represent interests other than the Federal Government's, not solely for their individual qualifications or for their independent service. As such, they are not "Special Government Employees" (SGEs) and they are not bound by ethical standards applicable to SGEs. Committee membership is often intentionally comprised of people who have a vested interest in a particular park or program area. In other words, bias and conflict of interest may be inherent to the makeup of a committee. Therefore, it is unreasonable to expect total objectivity in the way a committee member responds to an issue.

However, because committee members do serve in a position of public trust, they should abide by at least the basic principles of ethical conduct. For example, a committee member who has a financial interest in a matter before the committee should either disqualify himself from voting on the matter or make a public disclosure of his financial interest prior to voting. No single across-the-board standard for committee member conduct has been issued to date; individual committees should discuss the issue among themselves and incorporate appropriate language in their committee by-laws. The by-laws should address, in particular, the conditions under which individual members-although not SGEs-may and should recuse themselves from voting on certain matters that may come before the committee.

In those cases where committee members are classified as SGEs, there are ethical standards of conduct that apply. To avoid potential conflicts, each member should be given adequate information about SGE status and should complete any required appointment papers and disclosure forms prior to service on a committee.

Background materials may be obtained through the Washington Employee Relations office, the Committee Management Officer, Departmental ethics staff, or from the Office of Government Ethics, which has government-wide jurisdiction on Federal ethics issues. GSA and the Office of Government Ethics have developed a videotape to orient advisory committee SGEs about their responsibilities. A copy is available from the WASO Office of Policy.

S. MAY A COMMITTEE MEMBER "LOBBY" MEMBERS OF CONGRESS OR ENCOURAGE THE PUBLIC TO TAKE A POSITION ON PENDING LEGISLATION REGARDING MATTERS UNDER THE COMMITTEE'S PURVIEW?

Appropriated funds may not be used for lobbying activities. Individual members are free to lobby on their own time, using their own funds. But lobbying activities may not be a part of a committee's activities, nor may NPS employees who work with the committee encourage the committee to engage in lobbying activities.

T. MUST A COMMITTEE'S AFFAIRS BE OPEN TO THE PUBLIC?

With few exceptions, advisory committee meetings must be open to the public. The Designated Federal Officer for each advisory committee must:

1. Arrange meetings for reasonably accessible and convenient locations and times;
2. Publish adequate advance notice of meetings in the Federal Register;
3. Open advisory committee meetings to the public (see rare exceptions below);
4. Make sure the meeting room size is sufficient to accommodate interested members

of the public;

5. Allow any member of the public to file a written statement with the committee;
6. Make certain the committee has established procedures to address whether, and how, a member of the public may speak at a meeting;
7. Make available for public inspection all papers and records, including detailed minutes of each meeting; and
8. Maintain records of expenditures, with limited exceptions, for public inspection.

The following are examples of meetings that may be closed or partially closed under provisions of the "Government in the Sunshine Act," Public Law 94-409, September 13, 1976 (these rarely occur in the NPS):

1. Those that include discussions of classified information;
2. Review of proprietary data submitted in support of grant applications; and
3. Deliberations involving consideration of personnel information protected by the Privacy Act, Public Law 93-579, December 31, 1974.

Meetings of subgroups of advisory committees, including meetings of two or more members solely to gather information, conduct research, analyze relevant issues and facts, or draft proposed position papers for deliberation by the entire committee or a subcommittee, are not considered meetings of the advisory committee that must be open to the public. Though such meetings need not be publicized, all such meetings should nevertheless be open to observation by interested persons.

U. WHAT RESTRICTIONS APPLY TO TRAVEL AND RELATED EXPENSES INCURRED BY COMMITTEE MEMBERS?

FACA (and most statutes authorizing individual advisory committees) allow--but do not require--agencies to pay travel expenses, including per diem in lieu of subsistence, for committee members while engaged in the performance of their duties away from their homes or regular places of business. Any travel expenses for which a committee member expects to be reimbursed must receive prior approval under a properly executed Travel Authorization. Advisory committee members may need to be reminded that they have no authority to obligate or expend Government funds without prior approval by a duly authorized NPS official.

V. WHAT COMMITTEE RECORDS MUST BE KEPT?

To comply with the Federal Records Act and FACA, committees must maintain detailed minutes of each meeting, including a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the committee.

Committees must also maintain permanent records that document the essential purpose and work of the committee and provide an enduring record of its accomplishments. All documents that explain the basis for a committee's recommendations and conclusions should be carefully maintained. Permanent records must be preserved and transferred to the National Archives. It is especially important to separate administrative files, such as those relating to personnel, payroll, and fiscal matters, from program files that document the substantive work of the committee. The ultimate disposition of these two categories of files will differ.

The National Archives and Records Administration has additional information available at <http://www.archives.gov/records-mgmt/grs/grs26.html>, and the GSA has a videotape on record-keeping. You may obtain a copy from the Office of Policy.

W. MUST A VERBATIM TRANSCRIPT OF ADVISORY COMMITTEE MEETINGS BY MAINTAINED?

FACA and GSA regulations require that detailed minutes be kept for each advisory meeting. GSA's regulations are explicit as to what must be included in the minutes (see 41 CFR 101-6.1025). Although FACA contains references to transcripts as well as minutes, GSA has concluded that the detailed minutes are sufficient for compliance purposes. While managers may opt not to maintain verbatim transcripts, it is good practice to tape record committee proceedings for future reference.

APPENDIX A

CHARTER REQUIREMENTS

Each charter must contain the following information:

1. The committee's official designation.
2. The committee's objectives and the scope of its activity.
3. The period of time necessary for the committee to carry out its purpose.
4. The agency or official to whom the committee reports.
5. The agency responsible for providing the necessary support for the committee.
6. A description of the duties for which the committee is responsible and, if such duties are not solely advisory, a specification of the authority for such functions.
7. The committee's estimated annual operating costs in dollars and work-years.
8. The estimated number and frequency of committee meetings.
9. The charter's termination date, if less than two years from the date of the committee's establishment.
10. A description of the committee's membership and other membership provisions.
11. The name of the designated federal officer (DFO), or the DFO's designee, to chair or attend each meeting of the advisory committee.
12. If the committee is to be composed of formal subcommittees or subgroups, they should be identified and described as to their composition and specific functions.
13. The specific statutory authority for the committee.
14. The date the charter is filed. (The filing date is inserted by WASO.)